

No. 12,279

In the United States Court of Appeals
for the Ninth Circuit

ESTATE OF DELL HINDS HIGGINS, DECEASED, SYDNEY M.
HIGGINS, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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FILED

OCT 12 1971

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CLERK

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OPINION BELOW

The Tax Court entered memorandum findings of fact and opinion (R. 113-127) which are not reported.

JURISDICTION

This petition for review (R. 128-136) involves Federal estate taxes for the taxable year 1945. On March 20, 1946, the Commissioner of Internal Revenue mailed to the taxpayer notice of deficiency in the total amount of \$29,009.69. (R. 9-12.) Within ninety days thereafter and on May 13, 1946, the taxpayer filed a petition with the Tax Court for a redetermination of that deficiency under the provisions of Section 871(a) of the Internal Revenue Code. (R. 1.) On June 3, 1946, the

taxpayer filed an amended petition. (R. 3-21.) The decision of the Tax Court sustaining the deficiency was entered February 16, 1949. (R. 127.) The case is brought to this Court by a petition for review filed May 11, 1949 (R. 128-136), pursuant to the provisions of Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTIONS PRESENTED

1. Whether the corpus of a trust created by the decedent in 1928 is taxable under Section 811 (c) of the Internal Revenue Code, as a transfer intended to take effect in possession or enjoyment at or after decedent's death, where the grantor reserved the right to have the trust corpus invaded for her comfort or well-being.

2. Whether the corpus of the 1928 trust is includible in the decedent's estate under Section 811 (d) (2) of the Internal Revenue Code.

3. Whether it is the entire value of the trust at the decedent's death or some lesser amount which is includible in the decedent's gross estate.

STATUTE AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*.

STATEMENT

The facts found by the Tax Court (R. 113-126) which are pertinent to the issues before this Court are as follows:

The decedent taxpayer, Dell Hinds Higgins, was born on May 31, 1869, and died March 3, 1945. At the time of her death she was a resident of the County of San Diego, California. The estate tax return, filed by the taxpayer, did not disclose a net estate. (R. 113.) Decedent's two children, Sydney and Helen, survived her. (R. 114.)

Decedent's first husband died in 1913, and she married her second husband, Harrow, in 1925. (R. 114.) After the marriage, Harrow constantly made demands upon the decedent for money, and, as a result, she became highly nervous. (R. 115.)

A few months before the present trust was created decedent went to a sanitarium near San Diego, California. She desired to get away from Harrow. (R. 115.)

On March 19, 1928, decedent's doctor called Sydney and requested him to come to the sanitarium. Harrow had been coming there frequently and disturbing decedent by making demands upon her for money, and on that morning Harrow had thrown a bunch of keys at decedent, hitting her in the face. Sydney went to his mother immediately. She was in a very nervous condition and seriously ill. (R. 115.)

On March 24, 1928, the decedent made a transfer under trust of most of her property. (R. 115-117.) Decedent expressed her intention to divest herself of all her property in such a manner that it would not be subject to the Federal estate tax. (R. 116.) Further, she felt that the establishment of this trust was the only way to free herself from the demands of Harrow and to prevent him from obtaining any part of her property. Five thousand dollars was paid to Harrow in connection with his divorce from the decedent. (R. 117.)

The Bank of Italy National Trust and Savings Association was named trustee of the trust. Its duties and powers as trustee included the following (R. 117-118):

a. The Trustee shall hold and manage the Trust Estate in all respects for the best interests of said Trust Estate and shall invest and reinvest all funds of the Trust Estate in such manner as to produce the largest net income consistent with a high degree of safety; all investments shall be on such security

or in such securities as may be lawful for the investment of the funds of savings banks in the State of California; the Trustee shall act with diligence to so hold and manage the Trust Estate and the property and funds of the Trust Estate that the net income of the Trust Estate shall be as large as possible within the limit of the restrictions hereinbefore set forth.

* * *

e. In the event that legal service or legal advice may be necessary in order to preserve or protect the Trust Estate the sole right to select and appoint the attorney or attorneys to represent the Trust Estate shall be in any two of the following persons, to wit: (1) The Trustor; (2) Helen B. Kendall; and (3) Sydney M. Higgins; after the death of the Trustor such right to appoint and select such attorney or attorneys shall be in the said Helen B. Kendall and Sydney M. Higgins, or the survivor of them.

f. The Trustee shall pay out of the corpus of the Trust Estate the funeral expenses of the Trustor, upon the death of Trustor, the Trustee shall also pay out of the corpus of the Trust Estate all inheritance and estate taxes owing by the estate of the Trustor or by the beneficiaries herein designated upon the death of Trustor.

With respect to the current net income, the trust indenture provided as follows (R. 118-119):

5. During the continuance of this trust the net income of the Trust Estate remaining after payment of the costs and expenses of the administration and management of this Trust shall be paid by the Trustee as follows:

A. During the lifetime of the trustor:

a. Seventy-five Dollars (\$75) per month to Helen B. Kendall, or if she be dead to her issue by right of representation.

b. Seventy-five Dollars (\$75) per month to Sydney M. Higgins, or if he be dead to his issue by right of representation.

c. The entire balance of the net income of the Trust Estate to the Trustor.

B. After the death of the Trustor:

In equal shares to Helen B. Kendall and Sydney M. Higgins; in the event of the death of either of said beneficiaries then the share of such beneficiary shall be paid to the issue of such deceased beneficiary by right of representation.

Sydney and Helen have each been receiving monthly payments as above provided. (R. 119.)

By its terms the trust is to terminate upon the death of decedent and both of her children, at which time the corpus is to be distributed one-half to the issue of Sydney and one-half to the issue of Helen by right of representation. Failing issue of either, the entire corpus is to go to the issue of the other. Failing issue of both, the corpus is to go to the heirs at law of Sydney and Helen. (R. 119.)

The trust is declared to be irrevocable. However, the trustor during her lifetime reserved the right from time to time to appoint a new and different trustee being restricted only to an incorporated trust company authorized to do a trust business in the State of California. In accordance with that reserved power decedent twice changed the trustee. (R. 119.)

Paragraph 7 of the trust indenture provides as follows (R. 119-120):

If it should happen during the continuance of this trust that the net income of the Trust Estate is insufficient to adequately provide for the comfort, well-being or education of any of the beneficiaries of this trust, and if such beneficiary has no other means sufficient for the purpose, then upon

representation and proof of such facts to a court of competent jurisdiction and upon the order of such court resort may be had to the corpus of the Trust Estate to the extent necessary to relieve the situation, and any amounts so paid out of the corpus of the Trust Estate shall be charged to the respective share of the particular beneficiary receiving such amounts.

Early in 1941 decedent desired to alter or amend the trust indenture so as to relieve the trustee of the restrictions contained in subparagraph a. of paragraph 3, *supra*, with respect to investing the trust funds "in such securities as may be lawful for the investment of the funds of savings banks in the State of California." Therefore, decedent had her two children, Sydney and Helen, join her in filing with the Superior Court of the State of California, on February 6, 1941, a document captioned "Complaint for Declaration of Rights under Trust Indenture and for Equitable Relief." The trustee was named defendant. In the complaint it was alleged that decedent "did not and could not anticipate the economic changes that have taken place since March 24, 1928, upon which said date said Trust was established" and as a consequence the income from the restricted investments would probably be so small that an application to the court for invasion of corpus under paragraph 7, *supra*, would be required. (R. 120-121.)

The trustee-defendant filed an answer on February 25, 1941, in which substantially all of the allegations of fact contained in the complaint were admitted and in which the trustee joined decedent in praying for such decision and judgment as the court considered proper in the premises. On March 13, 1941, the court entered its decree changing subparagraph a. of paragraph 3 of the trust indenture to read as follows (R. 121):

a. Trustee shall hold and manage the Trust Estate in all respects for the best interests of said

Trust Estate, and shall invest and reinvest all funds of the Trust Estate in such manner as to produce the largest net income consistent with a high degree of safety; all investments hereafter from time to time made by the Trustee shall be in bonds, whether the same be lawful for the investment of funds of savings banks in California or not, and in such preferred and/or common stocks as the Trustee may from time to time select; the Trustee shall act with diligence and shall so hold and manage the trust estate and the property and funds composing the same that the net income of the Trust Estate shall be as large as possible within the limits of the restrictions hereinabove set forth.

The form of the court decree entered March 13, 1941, "did not truly express the agreement of the parties" so, on April 19, 1941, decedent again went to court, this time filing a "Notice of Motion to Vacate and Set Aside Judgment and Enter Judgment in Lieu Thereof." On April 21, 1941, the court entered another decree again changing subparagraph a. of paragraph 3 of the trust indenture to read as follows (R. 122):

a. Trustee shall hold and manage the Trust Estate in all respects for the best interests of said estate, and shall invest and reinvest all funds of the trust estate in such manner as to produce a reasonably high net income, for which purpose the Trustee may make any investments which are of medium or higher grade; all investments hereafter from time to time made by the Trustee shall be in: bonds, mortgages, and/or trust deed notes, secured by improved real estate (whether the same be lawful for the investment of funds of savings banks in California or not), and/or in such preferred and/or common stocks as the Trustee may select, and within the investment limitations above set forth.

On May 27, 1943, decedent petitioned the court for an order authorizing and directing the trustee to pay to

her the sum of \$300 per month out of income, if available, otherwise out of corpus. The petition stated in part that the estimated available income of \$225 per month for the succeeding twelve months "is insufficient to adequately provide for her comfort and well-being, and that she has no other means of support or other income." No one appeared to oppose the granting of the relief prayed for and on June 11, 1943, the court entered its order authorizing and directing the trustee to make the payment of \$300 per month "paying thereon the net income from said trust and in addition thereto such part of the corpus of the trust estate as may be necessary to make such monthly payments until the further order of this Court." (R. 122-123.)

On October 25, 1943, decedent filed with the court a Petition for Order Allowing Additional Payment from Corpus of Trust. The petition stated in part that in previously petitioning the court for \$300 per month, a payment of \$75 per month to her chauffeur had been overlooked so that the net income available to her amounted to only \$225 per month; furthermore, in the past sixty days, due to the pending liquidating of Hinds Estate, Incorporated, for salary of \$70 per month as vice president had been discontinued. In praying for an order authorizing and directing the trustee to pay her \$445 per month (\$300 plus \$75 plus \$70 out of income, if available, otherwise out of corpus), decedent stated in her petition as follows (R. 123):

That the whole of said trust estate was set up out of petitioner's own funds and for her benefit and support; that she is over seventy years of age, and has need of the comforts it can give her as never before.

On November 19, 1943, decedent filed with the court an Amendment to Petition for Order Allowing Addi-

tional Payment from Corpus of Trust (R. 123-124) in which the prayer of her petition filed on October 25, 1943, was amended to read as follows (R. 124) :

Wherefore, petitioner prays for an order of Court authorizing and directing the First National Trust & Savings Bank of San Diego, as Trustee, to pay to petitioner or her order as Trustor under said Trust Indenture, or in case of her illness or incompetence, to pay the same for her benefit for her support and maintenance, the sum of Four Hundred and Forty-five (\$445.00) Dollars per month, paying the same out of the net income available for said purpose, but if said income is insufficient to pay said sum, then out of the balance of the corpus of said trust estate.

On the same day, November 19, 1943, there being no one appearing in opposition to the petition, the court entered its order authorizing and directing the trustee to make payments as prayed for in the petition of October 25, 1943, as amended on November 19, 1943. (R. 124.)

Pursuant to the court orders of June 11, 1943, and November 19, 1943, the trustee paid to decedent out of corpus of the trust the following amounts (R. 124) :

1943 (subsequent to June 11)....	\$ 624.06
1944	1,175.17
1945 (prior to decedent's death on March 3).....	130.25

Total payments out of corpus.. \$1,929.48

All of the court proceedings detailed above were uncontested. Except for the original petition to alter or amend the trust, in which decedent was joined by her two children, decedent alone, through her attorney, filed all subsequent petitions, although the names of the children appear in the captions. Neither of the chil-

dren ever requested an increase in their monthly payments of \$75 each from the trust; nor did they ever petition the court for payments out of corpus. No corpus was ever used for the benefit of either of the two children. (R. 124-125.)

For decedent's funeral expenses \$574.94 has been paid, and \$3,262.44 has been paid as the state inheritance tax. (R. 125.)

In his determination the Commissioner held (R. 9-12) that the value of the corpus created by the decedent in 1928 was includible in her gross estate, and accordingly he increased the estate by \$188,302.40, and as a result arrived at a deficiency in estate tax in the amount of \$29,009.69.

The Tax Court upheld the Commissioner's action in including the value of the corpus of the trust in the gross estate (R. 113-127), and accordingly sustained the deficiency (R. 127). The present review followed.

SUMMARY OF ARGUMENT

1. The decedent did not make a completed transfer during her lifetime. Only at her death did the rights of the two children-beneficiaries become consummate. There was an external standard, viz., comfort, well-being or education, which measured the right of the decedent to have the corpus invaded. Thus, she retained a "string" on the property, rendering it includible within her gross estate under Section 811 (c) of the Internal Revenue Code.

2. Similarly, since there was an external standard established, and since the contingency of invasion was no longer a contingency at her death—the trust indenture was changed twice and invasion was occurring—the trust property is includible within the grantor's gross estate under Section 811 (d) (2) of the Internal Revenue Code.

3. The full value of the trust property is includible within the grantor's gross estate. By exercising her "string" on the corpus, or by exercising her power to alter, amend or revoke, the decedent could conceivably have caused the entire trust property to revert to her. Hence, there is no basis for speculating upon the value of the property interest. The Tax Court correctly so held.

ARGUMENT

The Tax Court held, on the authority of *Commissioner v. Estate of Church*, 335 U. S. 651, that the portion of the trust from which decedent reserved the right to income for her life was includible in her estate. However, according to Section 81.17 of Treasury Regulations 105 (Appendix, *infra*), the *Church* case, *supra*, is inapplicable in a situation where the decedent died on or before January 17, 1949, and where the decedent's only right or interest in the property consisted of an estate for life. The Commissioner, therefore, in the interest of the fair administration of the federal tax laws, is not urging this issue in the instant case.

I

The Decedent's 1928 Transfer in Trust Was Intended to Take Effect in Possession or Enjoyment at or After Her Death Within the Meaning of Section 811 (c) of the Internal Revenue Code

Under the doctrine of *Estate of Spiegel v. Commissioner*, 335 U. S. 701, a transfer is intended to take effect at or after the decedent's death within the intendment of Section 811 (c) (Appendix, *infra*) if the provisions for distribution of the corpus are all made with reference to the grantor's death and if she retains some contingent interest in the trust corpus which makes it uncertain until at or after her death that the beneficiaries will receive the trust property. This has the effect of suspending the disposition of the trust corpus until

that time. *Helvering v. Hallock*, 309 U. S. 106; *Fidelity Co. v. Rothensies*, 324 U. S. 108; *Commissioner v. Estate of Field*, 324 U. S. 113. In other words, the decedent's death is the indispensable event which matures or enlarges the beneficiaries' interests or the decedent has retained some "string" on the trust corpus which delays until her death or thereafter "the ripening of full dominion over the property by the beneficiaries." *Fidelity Co. v. Rothensies*, *supra*, p. 112. The fact that the enjoyment or possession of the trust property by the remaindermen "is held in suspense until the moment of the grantor's death or thereafter" (*Fidelity Co. v. Rothensies*, *supra*, p. 111) and that the transfer is effectuated "finally and definitely at the decedent's death" (*Goldstone v. United States*, 325 U. S. 687, 692) requires the inclusion of the value of the trust property in a decedent's gross estate. *Commissioner v. Bank of California*, 155 F. 2d 1, certiorari denied, 329 U. S. 725.

The nature of the decedent's "string" or interest in the trust corpus is immaterial so long as it has the required effect of rendering the transfer inchoate. However, most of the decided cases involve the retention by the decedent of a possibility of reversion (see e. g., *Estate of Spiegel v. Commissioner*, *supra*; *Commissioner v. Estate of Field*, *supra*) or its equivalent, a contingent general power of appointment (*Fidelity Co. v. Rothensies*, *supra*).

The rule laid down by the Tax Court (R. 126) is that the required "string" or interest of the decedent may be supplied by the reservation of the right to have the trust corpus invaded for the grantor's benefit. The taxpayer does not argue to the contrary. (Br. 42, 46.) If the power to vest the property in the donor is governed by some external standard, enforceable in a court of equity, the trust is taxable under Section 811 (c). *Blunt v. Kelly*, 131 F. 2d 632 (C. A. 3d) (support, care

or benefit); *Chase Nat. Bank of City of New York v. Higgins*, 38 F. Supp. 858 (S. D. N. Y.) (needs of grantor); *Gallois v. Commissioner*, 4 T. C. 840, affirmed on another ground, 152 F. 2d 81 (C. A. 9th), certiorari denied, 327 U. S. 798 (misfortune and support); *Toeller's Estate v. Commissioner*, 165 F. 2d 665 (C. A. 7th) (misfortune or sickness); *Champlin v. Commissioner*, 6 T. C. 280 (comfort, maintenance, or benefit); *Estate of Rosenwasser v. Commissioner*, 5 T. C. 1043 (maintenance and comfort).

Therefore, as was stated in *Commissioner v. Irving Trust Co.*, 147 F. 2d 946, 949 (C. A. 2d):

In the case where a return of any part of the corpus to the settlor will depend solely upon the discretion of the trustee, the true test as to its inclusion in the taxable estate of the settlor is whether the trustee is free to exercise untrammelled discretion, or whether the exercise of his discretion is governed by some external standard which a court may apply in compelling compliance with the conditions of the trust instrument. If the former, the corpus is not subject to taxation as a part of the settlor's estate.¹

The decedent by the trust instrument in this case authorized the corpus to be invaded for her comfort, well-being or education. (R. 120.) The taxpayer contends (Br. 43) that "Under such provisions no clear external standard was set * * *." It is difficult to understand how the taxpayer can seriously urge this; it is clear that such a reservation by the decedent sets positive and external standards for the invasion of the corpus as to require the inclusion of the transfer in the decedent's gross estate. The decedent possessed

¹ There was a further statement and qualification of the court's position in *Stix v. Commissioner*, 152 F. 2d 562, 563 (C. A. 2d): " * * * no language, however strong, will entirely remove any power held in trust from the reach of a court of equity."

a power until the time of her death to revest the corpus in herself.

If this discretion had been exercisable by trustees, they would have been required to use reasonable judgment and to act in good faith. A court of equity could have compelled them to make payments to the decedent out of corpus if it were necessary in order to meet the standard established. See Restatement of the Law, Trusts, Sec. 187; 2 Scott, Trusts, Sec. 187; *Blunt v. Kelly*, *supra*.

The fact that the discretion in the instant case was given to a court instead of to trustees does not affect the result. If the trustees' decision as to invasion were subject to court review, then the question would be whether or not it was necessary for the comfort and well-being of the decedent. If the application were made directly to the court, as it was in this case, then the question would be precisely the same. Therefore, the only inquiry is as to the existence of an external standard.

The California decisions require the conclusion that the trust provision in the instant case constitutes an external standard. In *Estate of Smith*, 23 Cal. App. 2d 383, 386, a testamentary trust provided that the trustees should apply the income "so far as in their judgment they deem it necessary" to the support, maintenance, and education of the beneficiary. The court pointed out that the soundness of the trustees' discretion was reviewable. This result is to be compared with *Campbell v. Folsom*, 70 Cal. App. 2d 309, 312, where a trust instrument gave the trustees "absolute discretion." The court held that the soundness of the trustees' judgment was not reviewable; it could be attacked only for fraud or bad faith.

These cases are in accord with Section 2269 of the California Civil Code:

A discretionary power conferred upon a trustee is presumed not to be left to his arbitrary discretion, but may be controlled by the proper court if not reasonably exercised unless an absolute discretion is clearly conferred by the declaration of trust.

At this juncture, it should be noted that the statement in *Commissioner v. Irving Trust Co.*, *supra*, relative to the test to be applied in this area, assumes the existence of a *discretionary* power. The test is whether the power is absolute, and thus untrammelled, or whether the exercise of the power is governed by some external standard.

The taxpayer points out (Br. 43) that in *Estate of West v. Commissioner*, 9 T. C. 736, affirmed *sub nom. St. Louis Union Trust Co. v. Commissioner*, 173 F. 2d 505 (C.A. 8th), the trustor was also a co-trustee. This fact is quite irrelevant. *Jennings v. Smith*, 161 F. 2d 74 (C.A. 2d).

In addition to the possibility of invasion of the principal for the decedent's comfort and well-being, the corpus was available and actually used for the payment of the decedent's funeral expenses and inheritance taxes. This is merely one more of the indicia denoting the incompleteness of the transfer and the fact that a "string" was retained by the decedent.

II

The Corpus of the 1928 Trust Is Includible in the Decedent's Gross Estate under Section 811 (d) (2) of the Internal Revenue Code

Section 811 (d) (2) of the Internal Revenue Code (Appendix, *infra*) applies to transfers on or prior to June 22, 1936, and provides for the inclusion in the gross estate of property transferred by the decedent, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend or revoke. It is plain that the

instant case falls within the scope of these provisions as well as those of subdivision (c).² *Perrin v. Commissioner*, decided March 13, 1944 (1944 T. C. Memorandum Decisions, par. 44,076); cf. *Wenger v. Commissioner*, 127 F. 2d 523 (C. A. 6th), certiorari denied, 317 U. S. 646. And see also I Paul, Federal Estate and Gift Taxation (1942) and 1946 Supplement, Section 7.08.

Court approval was necessary in order to alter or amend, but it should be noted that in the court proceedings, the trustee was the defendant (R. 120) and that the decedent, in conjunction with either of her two children, had the sole right to select the attorney to represent the trustee (R. 15, 118). Moreover, the most effective way for the decedent to revoke, alter or amend the trust was to withdraw the corpus. She was in the process of doing this at the time of her death; the trust instrument was twice changed so that the corpus could be invaded for the benefit of the decedent. Distinguishable from this situation is *Jennings v. Smith*, 161 F. 2d 74, 78 (C. A. 2d), where the court deemed the important factor to be that the power to invade capital was based on "contingencies which had not happened." Here, the corpus was being invaded periodically; there was no contingency. It was possible for the decedent to recapture the entire corpus during her lifetime. Hence subdivision (d) applies. *Helvering v. City Bank Co.*, 296 U. S. 85; *Commissioner v. Estate of Holmes*, 326 U. S. 480; *Porter v. Commissioner*, 288 U. S. 436.

The taxpayer's further contention requires only brief notice. He argues (Br. 57) that the application of Sections 811 (c) and (d) of the Internal Revenue Code

² This situation is to be compared with *Estate of Frew v. Commissioner*, 8 T. C. 1240, and *Industrial Trust Co. v. Commissioner*, 165 F. 2d 142 (C. A. 1st), where the corpus of the trust was not invadable for the benefit of the settlor but for other beneficiaries.

to the 1928 trust is in "contravention to the Fifth and Fourteenth Amendments to the Constitution." It is well settled that a taxing statute is not unconstitutional as to trusts created prior to its enactment. *Chase Nat. Bank v. United States*, 278 U. S. 327; *Reinecke v. Northern Trust Co.*, 278 U. S. 339. The relevant factor is that the "string" or the power exists at the determinative date, the decedent's death. There was not a complete transfer for estate tax purposes until 1945 when the contingencies were terminated. Further, the taxpayer's argument is addressed primarily to the provision relative to reserved life estates which as pointed out *supra*, is not being urged by the Commissioner.

III

The Entire Value at the Decedent's Death of the Trust Corpus Is Includible in the Gross Estate

The entire value of the trust corpus is the amount includible in the decedent's gross estate. If taxability rests upon the provision of the trust instrument authorizing the trustor to apply to a court of competent jurisdiction in order to have the corpus invaded for her comfort or well-being—a provision which amounts to a possibility of reversion to the decedent—it is the value of the trust property which was subject to the decedent's possibility of reversion which is includible in the decedent's gross estate, not the value of the possibility of reversion. That point was squarely decided in *Estate of Spiegel v. Commissioner*, *supra*, where the Supreme Court stated (p. 707):

It is contended that since the monetary value of the settlor's contingent reversionary interest is small in comparison with the total value of the corpus, the possession or enjoyment provision of Section 811 (c) should not be applied. But inclusion of a trust corpus under that provision is not dependent upon the value of the reversionary interest * * * The question is not how much is the

value of the reservation but whether after a trust transfer, considered by Congress to be a potentially dangerous tax evasion transaction, some present or contingent right or interest in the property still remains in the settlor so that full and complete title, possession or enjoyment does not absolutely pass to the beneficiaries until at or after the settlor's death.

This Court reached the same conclusion in *Gallois v. Commissioner*, 152 F. 2d 81, 83, certiorari denied, 327 U. S. 798:

* * * the imminence or remoteness of the likelihood of the revesting contingency's occurrence is not a matter for our consideration.

The Tax Court was therefore correct in stating (R. 126):

And whatever doubt there may have been that such an invasion affecting only a part of the estate might be too insignificant to justify taxing all of it must now yield to the principle enunciated in *Estate of Spiegel v. Commissioner* * * *.

The *Spiegel* case, *supra*, marks the culmination of the recent trend to sweep aside technicalities of property law and place emphasis on the test of whether there is a shift of economic interests at death. It follows, then, that with the trust principal payable to the decedent for such broad and unpredictable purposes, there is no basis for a computation which would result in a conclusion that some part of the trust principal was not subject to invasion for decedent's benefit. Cf. *Merchants Bank v. Commissioner*, 320 U. S. 256; *Henslee v. Union Planters Bank*, 335 U. S. 595. Inasmuch as the decedent reserved the right to have the corpus invaded if necessary for her comfort and well-being, and thus kept the entire fund available for her own purposes until she died, the entire corpus is clearly includible in

her gross estate. ~~Therefore, the entire value of the trust property is includible in the decedent's gross estate.~~

Similarly, if taxability rests upon the power to alter or amend, it is obvious that the entire value of the trust corpus at the date of death must likewise be the measure of the tax. *Commissioner v. Estate of Holmes*, 326 U. S. 480; *Du Charme's Estate v. Commissioner*, 164 F. 2d 959 (C. A. 6th). The entire corpus was subject to change through the exercise of the decedent's power to have the corpus invaded for her comfort and well-being.

IV

In Any Event, the Decedent Made a Transfer in Contemplation of Death Within the Meaning of Section 811 (c) of the Internal Revenue Code

There is still another point upon which the Commissioner relied to support the inclusion of the trust property in the grantor's gross estate and upon which the Tax Court found it unnecessary to pass in view of the disposition that it made of the case. The Commissioner found that the transfer under trust by the decedent in 1928 was in contemplation of death within the meaning of Section 811 (c) of the Internal Revenue Code. (R. 9-12.) The definition of "contemplation of death" given in Treasury Regulations 105, Section 81.16 (Appendix, *infra*), is based largely on the comprehensive discussion in *United States v. Wells*, 283 U. S. 102. All attendant facts and circumstances are to be scrutinized to determine whether or not thoughts associated with death prompted the disposition. The inquiry, therefore, must be directed to the myriad of circumstantial factors attending each gift which may hold some clue as to what the decedent's motivation may have been. Each case must be decided in the light of its peculiar factual background. *City Bank Co. v. McGowan*, 323 U. S. 594; *Allen v. Trust Co. of Georgia*, 326 U. S. 630; *In re Kroger's Estate*, 145 F. 2d 901 (C.

A. 6th), certiorari denied, 324 U. S. 866; *Cronin's Estate v. Commissioner*, 164 F. 2d 561 (C. A. 6th). The decedent here was afraid that Harrow was going to cause her death in order to receive her property. The beneficiaries of the trust included the natural objects of her bounty. The transfer constituted almost the entirety of decedent's property. When her son—the executor of her estate—submitted the required sworn statement to the Bureau of Internal Revenue, he referred to the trust as a “will.” (R. 71.) The decedent provided for the payment of funeral expenses and inheritance taxes out of the trust corpus. See *Sloan's Estate v. Commissioner*, 168 F. 2d 470 (C. A. 2d). Hence, there would seem to be adequate basis for concluding that the transfer was in contemplation of death. Therefore, we suggest that the case be remanded to the Tax Court for consideration of this issue in the event that this Court should reverse.

The taxpayer urges (Br. 57) that the Tax Court erred in sustaining the objections to the admission into evidence of taxpayer's Exhibits 16 and 17 (R. 90-96, 110-111). It is plain that these rulings could not possibly be prejudicial to the taxpayer in that the evidence submitted was merely cumulative. Moreover, the proffered evidence related to an issue which the Tax Court did not pass upon, i. e., contemplation of death.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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OCTOBER, 1949.

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Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust, or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

(d) *Revocable Transfers*—

* * * * *

(2) *Transfers on or Prior to June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power

in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.16 [as amended by T. D. 5248, 1943 Cum. Bull. 1113]. *Transfers in contemplation of death.*—Transfers in contemplation of death made by the decedent after September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, must be included in the gross estate. A transfer in contemplation of death is subject to the tax although the decedent parted absolutely and immediately with his title to, and possession and enjoyment of, the property.

The phrase "contemplation of death," as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition.

Any transfer without an adequate and full consideration in money or money's worth, made by the decedent within two years of his death, of a material part of his property in the nature of a final disposition or distribution thereof, is, unless shown

to the contrary, deemed to have been made in contemplation of death.

If the executor contends that the value of a transfer of \$5,000 or more made by the decedent subsequent to September 8, 1916, should not be included in the gross estate because he considers that such transfer was not made in contemplation of death, he should file sworn statements with the return, in duplicate, of all the material facts and circumstances, including those directly or indirectly indicating the decedent's motive in making the transfer and his mental and physical condition at that time, and one copy of the death certificate.

SEC. 81.17 [as amended by T. D. 5512, 1946-1 Cum. Bull. 264, and as further amended by T. D. 5741, 1949-20 Int. Rev. Bull.] *Transfers intended to take effect at or after the decedent's death.*— A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's worth) is "intended to take effect in possession or enjoyment at or after his death," and hence the value of such property interest is includible in his gross estate, if

(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and

(2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).

A right to the possession or enjoyment of, or a right to the income from, the property, or the right to designate the persons who shall possess or enjoy the property or the income therefrom, constitutes a right or interest in the property. (See also sections 81.18 and 81.19.) Where possession or enjoyment of the transferred interest can be obtained by beneficiaries either by surviving the decedent or through the occurrence of some other

event or through the exercise of a power, subparagraph (1) shall not be considered as satisfied unless, from a consideration of the terms and circumstances of the transfer as a whole, the power or event is deemed to be unreal, in which case such event or power shall be disregarded. Except as provided in the next to the last paragraph of this section, the value of the property so transferred is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

* * * * *

In the case of a decedent who died on or before January 17, 1949, the date of the decision of the United States Supreme Court in *Commissioner v. Estate of Francois L. Church*, 335 U. S. 632, property transferred by the decedent shall not be included in his gross estate under this section if the decedent's only right or interest in the property consisted of an estate for his life. (See, however, sections 81.18 and 81.19.)